

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: May 11, 1998

TO : Robert H. Miller, Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Child & Family Services
Case 37-CA-4806

530-6067-2020
530-6067-2060
530-6067-2060-7700
530-6067-2060-8400
530-6067-2080-6200

This Section 8(a)(5) case was submitted for advice as to whether the Employer bargained in bad faith by insisting to impasse on proposals to retain sole discretion to grant wage increases and modify employee benefits during the term of the agreement.

FACTS

Since 1975, United Public Workers Local 646 (the Union) has represented social workers and therapists employed by Child & Family Services (the Employer). The most recent contract between the parties expired on October 31, 1996. In the fall of 1996, the parties commenced negotiations for a successor collective-bargaining agreement. The parties met on nine occasions between September 27, 1996 and July 28, 1997 and exchanged numerous proposals and counter proposals.¹

Throughout negotiations, as evidenced by its contract proposals, the Employer sought discretion to unilaterally change numerous terms and conditions of employment during the term of the agreement. On July 1, 1997 the Employer submitted its best, last and final offer. The Employer's final offer stated that the unit employees would be eligible to participate in wage increases, the medical

¹ The package proposals advanced by the parties contained certain common terms; however, numerous meaningful differences also existed.

plan, the retirement plan, the long term and temporary disability plans, the group life insurance plan, sick leave² and parking opportunities "on the same basis as the Employer's non-bargaining unit employees."³ The Employer also incorporated the unmodified terms of the prior collective bargaining agreement, which included a grievance/arbitration procedure and a no-strike clause, into its final offer.

The Union rejected the Employer's final offer. The Employer declared impasse and implemented its final offer on August 1, 1997; however, to date the Employer has not exercised the unilateral discretion contained in the proposal.⁴ There have not been any negotiations since the parties last met on July 28.

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by insisting to impasse on total control over wage increases and employee benefits.

Section 8(d) of the Act does not require parties engaged in collective bargaining to agree on their respective proposals, but does require more than a willingness to enter upon a sterile discussion of union-

² The sick leave proposal first appeared in the Employer's final offer.

³ The Employer had similar unilateral discretion in the prior collective-bargaining agreement with regard to wage increases and the medical plan. In negotiations, while not seeking to curb the Employer's discretion concerning the medical plan, the Union did propose a 2% across-the-board yearly wage increase not tied to any increase given to nonunit employees.

⁴ Thus, we need not decide whether implementation violated Section 8(a)(5) under McClatchy Newspapers, 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997).

management differences."⁵ The parties must enter discussions with open and fair minds and with the purpose of reaching agreement.⁶ Thus, an employer is "obliged to make some reasonable effort in some direction to compose his differences with the union ..."⁷

The Board draws a distinction between lawful "hard bargaining" and unlawful "surface bargaining." The Board will find bad faith bargaining based on the content of the employer's proposals if a party's bargaining position and proposals "indicate an intention by the Respondent to avoid reaching an agreement."⁸ Thus, although the Board will not determine whether a proposal is acceptable or unacceptable to a party, it will "consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract."⁹

The Board has found bad-faith bargaining based on an employer's insistence on unilateral control over wages and benefits. In A-1 King Size Sandwiches, supra, the employer insisted on unilateral control over merit increases; manning; scheduling and hours; layoff, recall, and the granting and denial of leave; promotion, demotion and discipline; the assignment of work outside the unit; and

⁵ NLRB v. American National Insurance Co., 343 U.S. 395, 402 (1952); Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984).

⁶ NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960), reh'g den. 277 F.2d 793 (5th Cir. 1960); Majure Transport Co. v. NLRB, 198 F.2d 735, 739 (5th Cir. 1952).

⁷ Atlanta Hilton & Tower, 271 NLRB at 1603, quoting NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 135 (1st Cir. 1953), cert. den. 346 U.S. 887 (1953).

⁸ A-1 King Size Sandwiches, 265 NLRB 850 (1982), enf'd 732 F.2d 872 (11th Cir. 1984), cert. den. 469 U.S. 1034; Litton Microwave Cooking Products, 300 NLRB 324, 327 (1990), enf'd 949 F.2d 249 (8th Cir. 1991), cert. den. 112 S.Ct. 1669 (1992).

⁹ Reichhold Chemicals, 288 NLRB 69 (1988), aff'd in relevant part 906 F.2d 719 (D.C. Cir. 1990).

changes of past practice. The Board noted that the General Counsel's surface bargaining complaint rested almost entirely upon the terms of the respondent's bargaining proposals, and that "[s]ometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to."¹⁰ In finding a Section 8(a)(5) violation, the Board stated that the employer's proposals "would strip the union of any effective method of representing its members ... further excluding it from any participation in decisions affecting important conditions of employment."¹¹ The Board further noted that, if accepted, the proposed contract would have left the union with substantially fewer rights than if it relied solely on its certification, which would require the employer to bargain each time it wanted to change an existing term and condition of employment.¹²

Relying on A-1 King Size Sandwiches, we have authorized issuance of a Section 8(a)(5) complaint on facts very similar to those present here. In AmeriGas,¹³ the employer had insisted to impasse on proposals which gave it unilateral control over life, medical and dental insurance, retirement, employee savings, 401(k), short-term disability, long-term disability and the flexible spending account. We concluded that the employer's proposal would effectively remove several critical economic terms from negotiation throughout the life of the agreement, and that

¹⁰ A-1 King Size Sandwiches, 265 NLRB at 858, quoting NLRB v. Wright Motors, 603 F.2d 604, 609-10 (7th Cir. 1979). See also Pioneer Asphalt, Case 36-CA-6972, Advice Memorandum dated May 24, 1993 (authorizing Section 8(a)(5) complaint, in the absence of any other indicia of bad faith, where the employer insisted on broad management rights, limited arbitration and no-strike proposals).

¹¹ A-1 King Size Sandwiches, 265 NLRB at 859, quoting San Isabel Electric Services, 225 NLRB 1073, 1080 (1976).

¹² 265 NLRB at 860.

¹³ Case 1-CA-31994, Advice Memorandum dated April 19, 1995. See also Petrolane, Case 21-CA-30141, Advice Memorandum dated October 31, 1994.

the employer could not lawfully insist on denying the union any input into the modification or elimination of those benefits.

We conclude, based on the content of the Employer's proposals here, that the Employer engaged in unlawful surface bargaining. Like the employer in AmeriGas, the Employer insisted to impasse on a combination of proposals that would effectively remove several critical economic terms as negotiable issues throughout the life of the agreement. Additionally, unlike the employer in AmeriGas, the Employer sought unilateral control over wage increases. The Employer's proposals "would strip the union of any effective method of representing its members ... further excluding it from any participation in decisions affecting important conditions of employment."¹⁴ The Union would be better served by merely relying on its statutory protection against unilateral changes. Thus, the Employer intended to frustrate bargaining rather than reach an agreement.

The Board's decision in Colorado-Ute¹⁵ does not require a different result. In that case, the Board held, inter alia, that an employer can lawfully insist to impasse on a merit pay proposal giving the employer unlimited discretion to determine merit wage increases. However, in later decisions, the Board has carefully specified that the Colorado-Ute analysis is inapplicable in situations where a party insists to impasse on total control over all compensation issues. In Harrah's Marina Hotel, the ALJ held that the employer's reservation to itself of unilateral control over all aspects of wages was an indicium of bad faith. Upholding the ALJ, the Board distinguished Colorado-Ute because "[t]he instant case involved unilateral control over all wages, not just merit increases. . . ."¹⁶

¹⁴ A-1 King Size Sandwiches, 265 NLRB at 859.

¹⁵ 295 NLRB 607 (1989), enf. den. 939 F.2d 1392 (10th Cir. 1991).

¹⁶ 296 NLRB 1116, n.1 (1989). See also The Cincinnati Enquirer, Inc., 298 NLRB 275 (1990), pet. for review den. sub nom. Cincinnati Newspaper Guild v. NLRB, 938 F.2d 276 (D.C. Cir. 1991).

The facts of the instant case more closely parallel those in Harrah's Marina Hotel than those in Colorado-Ute. Thus, in addition to unilateral control over wage increases, the Employer insisted on total, unilateral discretion to set, change, and eliminate a wide range of employee benefits, and thereby to unilaterally control significant aspects of employee compensation during the entire term of the collective-bargaining agreement.

Our conclusion that the Employer's insistence on its discretionary wage and benefit proposals constituted bad faith bargaining is not altered by the fact that the Union might have recourse to the grievance/arbitration provisions of the contract to challenge the Employer's exercise of discretion. In finding bad faith bargaining based upon broad management rights proposals, the Board often has emphasized the absence of a proposed grievance procedure which would provide some limit on the employer's discretion.¹⁷ However, the fact that the Employer's proposal would subject its benefit determinations to grievance/arbitration does not, per se, insulate it from a finding of bad faith bargaining.¹⁸ In A-1 King Size Sandwiches, supra, the Board held that the employer's "unilateral control" proposals would be subjected to only "illusory" access to grievance/arbitration where the only limitation on the employer's discretion over those terms was that they not infringe on other contractual provisions.¹⁹ Thus, grievance/arbitration would not provide

¹⁷ A-1 King Size Sandwiches, 265 NLRB at 860 n.21, quoting San Isabel Electric Services, 225 NLRB at 1079 n.7. See also Commercial Candy Vending Division, 294 NLRB 908, 909 (1989) (no violation where broad management rights clause on which employer insisted was subjected to grievance procedure).

¹⁸ See e.g., Viking Connectors Co., 297 NLRB 95, 104-05 (1989) (employer's unilateral wage proposal indicia of bad faith, even though said proposal subject to grievance/arbitration).

¹⁹ A-1 King Size Sandwiches, 265 NLRB at 860 n.20, 862-63.

a meaningful restriction on the employer's discretion since there were no standards or criteria against which an arbitrator could measure the employer's actions. In contrast, in cases where the availability of grievance arbitration contributed to a finding of no violation, arbitration provided a meaningful restriction on employer discretion. In Commercial Candy Vending Division,²⁰ for example, although the subcontracting provision of the management rights proposal, the provision of primary concern for the union, gave the employer the right to decide when to subcontract work, it could only do so "when necessary." Thus, the employer's discretion was restricted and an identifiable standard existed by which the arbitrator could meaningfully evaluate the employer's conduct.²¹

Here, as in A-1 King Size Sandwiches, grievance/arbitration would not be an effective check on the Employer's discretion. The Employer's proposals contain no limits on the Employer's discretion through adoption of standards or criteria that could be evaluated by an arbitrator, except that the Employer must confer benefits to unit employees "on the same basis as the Employer's non-bargaining unit employees." Thus, challenges to the exercise of the Employer's discretion would necessarily fail and the arbitral process would be essentially "illusory."

²⁰ 294 NLRB at 909 n.14, 913.

²¹ See also Aztec Bus Lines, 289 NLRB 1021, 1042-43 (1988) (Board rejected bad faith bargaining contention based on the employer's broad management rights proposal where its final proposal added a "just cause" standard as well as binding arbitration); American Commercial Lines, 291 NLRB 1066, 1079, 1137, 1143-44 (1988) (Board refused to rely on broad management rights proposal as an indicia of bad faith where the proposal was subject to the grievance/arbitration procedure, the employer acceded to the union's request that the right to release employees due to lack of work or other legitimate reason be subject to seniority, and proposal also contained a "proper cause" standard).

While the surface bargaining violation may be found based solely on the Employer's insistence to impasse on proposals to retain sole discretion to grant wage increases and modify employee benefits, we note that other Employer conduct at the bargaining table further evidences its bad faith. The Employer never budged from its initial proposal to retain unilateral control over wage increases and employee benefits, and indeed even added items that would be subject to its unilateral control as the bargaining progressed. The Board acknowledges that "[r]igid adherence to proposals which are predictably unacceptable to the Union may indicate a predetermination not to reach agreement..."²² While not per se unlawful, regressive bargaining may also evidence bad faith.²³ The Employer's refusal to consider alternatives to its initial bargaining proposal where it demanded unilateral control over the critical economic terms, and its movement in bargaining toward terms even more predictably unacceptable to the Union than its initial proposal, is further evidence of a fixed intent not to reach agreement.²⁴

B.J.K.

²² Kuna Meat Company, 304 NLRB 1005, 1013 (1991), enf'd 966 F.2d 428 (8th Cir. 1992) (employer bargained in bad faith where it refused to budge from its initial contract proposal which sought total discretion over a broad management rights clause not subject to arbitration).

²³ See e.g., Driftwood Convalescent Hospital, 312 NLRB 247, 247, 252-53 (1993).

²⁴ John Ascuaga's Nugget, 298 NLRB 524, 527 (1990), enf'd in rel. part 968 F.2d 991 (9th Cir. 1992).